

STRENGTHENING JUDICIAL REFORMS IN KENYA

Volume III

The Public's Perception And Proposals On The Judiciary In The New Constitution

ICJ (KENYA)

USAID

The Public's Perception And Proposals On The Judiciary In The New Constitution

Acknowledgement

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This report is a publication aimed at supporting effective interest group demand for judicial reform. It is the third line publication in a series of four. ICJ Kenya performs internal analyses of the Judiciary as well as content analyses of its reform proposals, mainly to test them for parity with ICJ and other civil society demands.

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Executive Director
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PART ONE

PUBLIC'S PERCEPTION AND PROPOSALS ON THE JUDICIARY IN THE NEW CONSTITUTION

1. BACKGROUND

In May 2002, the International Commission of Jurists (Kenya Section) and the Constitution of Kenya Review Commission hosted an Advisory Panel of Eminent Judicial Experts from the Commonwealth to help in coming up with proposals for a new judiciary post the constitutional review dispensation. In the course of their work, the panellists received submissions from a cross section of Kenyans, upon which submissions, the panel drafted its recommendations.

These recommendations were then subjected to a validation forum which brought together over seventy stakeholders drawn from all sectors, including legal professionals, commissioners from the Constitution of Kenya Review Commission and the Legal Reform Sector, donor agencies, members of the civil societies, media practitioners and the public at large, with a view of getting a consensus on what Kenyans want for the Judiciary post the constitutional review process.

From the time of the initial submission to the panel to the review of the panel's recommendations, key areas on the structure, functions and powers of the Judiciary were reviewed in-depth. This section of the publication endeavours to highlight in summary the things Kenyans want for the Judiciary post-constitutional review process as was discussed in the validation seminar..

Vesting Judicial Power and the Principles of Judicial Independence in the Constitution

Majority of those who made their submissions supported the idea that judicial power and principles of judicial independence should be vested in the constitution. They submitted that ;-

- Vesting judicial authority in the Judiciary along side the Executive and Parliament will ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya.
- The entrenchment of the terms of office for judges to ensure that as individuals, they enjoy the necessary protections to allow them to decide cases without fear or favour, affection or ill-will, in an open and public manner and in accordance with the law.
- The financial independence of the Judiciary should be entrenched in the Constitution. Thus, the Judiciary should enjoy financial budgetary autonomy, draw up its own budget and deal directly with the relevant state finance authority. The state shall then be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively.

- The Chief Justice should remain as the head of the Judiciary. With an overwhelming support for the creation of a Supreme Court, majority of the people submitted that three head posts should be created for the Supreme Court, Court of Appeal and High Court. The Chief Justice to preside over and have direct administrative responsibility for the Supreme Court, while the head of the Court of Appeal and High Court, preside over and have direct responsibility for the administration of those courts respectively.
- The following principles should be enshrined in the Constitution in relation to the terms and conditions of judicial office:
 - a) Judges shall be persons of integrity and ability with appropriate training and qualifications in law.
 - b) Judges shall exercise judicial power impartially and in accordance with the law and authority without fear, favour or ill will.
 - c) The tenure of Judges shall be guaranteed and adequately secured by the Constitution.
 - d) The Constitution shall provide that the remuneration and other terms and conditions of service of Judges shall be adequately secured by law and shall not be reduced or altered to their disadvantage.
 - e) Judges shall not be liable to any action or suit for any act or omission in the exercise of their judicial powers or functions.
 - f) Judges shall be free to form associations that represent their interests, to promote their professional training and to protect their judicial independence.
 - g) Judges are entitled to freedom of expression, belief, association and assembly on condition that they shall always conduct themselves in a manner that preserves the dignity of their office, their impartiality and the independence of the Judiciary.
 - h) Judges must always strive to uphold their integrity and independence by refraining from impropriety or any appearance of impropriety.
 - i) Judges shall devote their full time and attention to their judicial duties and shall not engage in any business, trade, profession or other activity inconsistent with the judicial function.

A Supreme Court

There was a unanimous consensus from all the submissions made, that a Supreme Court should be established comprising of a small number of select jurists of unquestionable skill, judgment and integrity.

There was also a unanimous consensus from all the submissions, that none of the current judges should be appointed to the Supreme Court.

A majority of the submissions reflected the view that the Court should be the final appellate court in all matters. This court will aid in the streamlining of decisions from the lower courts, give direction and remedy any defect in the Judiciary.

The minority argued that this Court should have original jurisdiction in some matters, especially constitutional cases, as a way of cutting costs on such matters since there will be reduction on the number of appeals.

Majority also called for the creation of a Constitutional Court, which shall be a division of the High Court with the right to appeal to the Supreme Court.

Appointment of Judges

There was a narrow margin between those who wanted the President to be involved in the appointment of judges and those opposed to it. Opposers argued that the President's involvement in the appointment of judges had catalysed corruption in the Judiciary. On the other hand, the proponents argued that the President's role in the appointment was one way of involving the public in the appointment of judges.

There was however, a unanimous consensus that appointment of judges be made in accordance with the written recommendation of the Judicial Service Commission. There were suggestions for the adoption of clearly established transparent appointment process with clearly stated criteria under the authority of a restructured Judicial Service Commission. This restructured Judicial Service Commission would also draw clear transitional mechanisms for the post-constitutional review dispensation.

Majority also submitted that judges' retirement age be trimmed downwards. They also called for the adoption of a fixed term for the office of the Chief Justice. A term of ten years was supported by majority. Upon termination of his/her term the Chief Justice will then serve as a Supreme Court judge until his/her retirement age.

Terms of Office, Conduct and Removal

It was unanimously agreed that a transparent complaint and removal process be established through a restructured Judicial Service Commission.

It was also unanimously agreed that a comprehensive Code of Conduct for judges, magistrates and judicial officers be formally adopted and that it should impose two important obligations. First, all judges, magistrates and judicial officers should be required to file with the Judicial Service Commission upon appointment and annually thereafter a financial disclosure statement clearly disclosing all assets, property or investments owned and all sources of income. Failure to make full and accurate financial disclosure may constitute judicial misconduct.

Second, all judges, magistrates and judicial officers should be under a legal obligation to disclose to the Judicial Service Commission any instance known to them of bribery or corruption in the administration of justice. Failure to report may constitute judicial misconduct.

Judicial Service Commission

There was a unanimous consensus from all the submissions that the Judicial Service Commission be restructured and entrenched in the Constitution.

Majority submitted that in its restructured form, the Judicial Service Commission should comprise the following members who shall be persons of high moral character and proven integrity:

- a) Full-time chairperson and secretary appointed by Commissioners themselves and not the President
- b) One member appointed by the Chief Justice, thus, the Chief Justice should not be a member of the Commission.
- c) Members of Judiciary from all levels, that is, from the Supreme Court, Court of Appeal, High Court and the Magistracy (Subordinate courts).
- d) Members from the Bar nominated by the Law Society of Kenya.
- e) Members elected by the faculties or schools of law of the universities in Kenya.
- f) Member(s) representing the Public Service Commission nominated by the Public Service Commission.
- g) Lay persons appointed by the President in consultation with the Parliamentary Judicial and Legal Affairs Committee
- h) The Attorney General as an ex-officio member.

The Judicial Service Commission shall have *inter alia* the following functions:-

- a. To recommend to the President persons for appointment as judges, including the Chief Justice.
- b. To review and make recommendations on terms and conditions of service of judges, magistrates and other judicial officers.
- c. To appoint, discipline and remove registrars, magistrates and other judicial officers including paralegal staff in accordance with the law as prescribed by Parliament.
- d. To receive and investigate complaints against judges in accordance with the Constitution.
- e. To prepare and implement programmes for the education and training of judges, magistrates and paralegal staff.
- f. To advice the government on improving the efficiency in the administration of justice and access to justice including legal aid.
- g. To encourage gender equity in the administration of justice in Kenya.
- h. Any other function as may be prescribed by the Constitution or any other legislation enacted by Parliament.

Access to Justice and Efficiency

It was unanimously stated that the courts and hence justice is not easily accessible in Kenya due to various reasons including the following;

- a. High Court fees

- b. Geographical location (most of them are far from the people or few compared to the population they serve)
- c. Complex rules and procedure
- d. Complex language/Legal jargon

Majority of the people submitted that Legal Aid would enhance access to justice. They stated that such an initiative must be supported by the government in order to succeed.

Majority called for removal of some limiting rules especially the rule on *locus standi*.

Majority want Alternative Dispute Resolution to be integrated in the legal system with clear provisions on their relationship with the formal court procedures.

Majority called for the transfer of all capital offence suits filed in the subordinate courts to the High Court.

Majority submitted that most courts lack essential facilities that are important to the improvement of efficiency and effectiveness of any court. Most attributed this to lack of funds due to minimal budgetary allocation to the Judiciary from the public coffers.

Kadhi's' Courts

Majority of the submissions made by the non-Muslims called for the removal of the Kadhi's Court provision in the Constitution, while majority of the Islamic participants opposed the idea.

Majority submitted that the Court is inefficient and called for enhancement of academic qualifications for the Kadhis, codification of an appellate system for the Kadhis Court.

Majority also submitted that this court was discriminatory against women and called for enhancement of women's access to the court.

Majority called for a separate legislation to govern the Kadhis Court.

Attorney General and the Director of Public Prosecutions

Majority submitted that the appointment, discipline, removal and retirement age for the Attorney-General be entrenched in the Constitution.

There was a unanimous consensus that the thirteen departments currently operating under the Attorney-General's office should be reduced.

Fifty percent of the submissions made called for the establishment of the Ministry of Justice whereas the other half wanted the Attorney General to continue serving as a Minister for Justice.

The proponents supported their call by stating that the Attorney General should cease being a Member of Parliament and leave that task to the Minister of Justice. Such a minister would attend to all political issues, including responsibility for legal, judicial and constitutional issues in Parliament.

Majority called for the office of Director of Public Prosecutions, to be vested with the powers that are now vested in the Attorney General under section 26(3), (4) and (8) of the Kenyan Constitution and clearly set out in legislation.

Magistracy

There was a unanimous consensus that Magistrates' remuneration should be raised. Majority called for the Judicial Service Commission to be responsible for making recommendations on the remuneration, terms and conditions of service for Magistrates.

Also there was a unanimous consensus that there should be a person/office specifically in charge of the Magistrate's Courts. Majority want this function to be vested in the office of the Chief Justice, while minority want the function to be vested in the Judicial Service Commission.

Majority called for the review of the *Magistrates' Courts Act* in order to realign the courts established under Section 7 (1).

Submissions were made that each magisterial area should be designated to its grade and jurisdiction to which a magistrate of a specified grade would be posted. Magistrates of lower grades posted to the courts of higher grades or designation may only serve in an acting capacity.

Election Petition Appeals

There was a unanimous consensus that appeals in election petitions should lie from the Court of Appeal to the Supreme Court on a point of law only.

Interim Measures

Majority submitted that all the sitting judges be sent home and reapply for their positions once the new constitution has been put in place.

Part Two

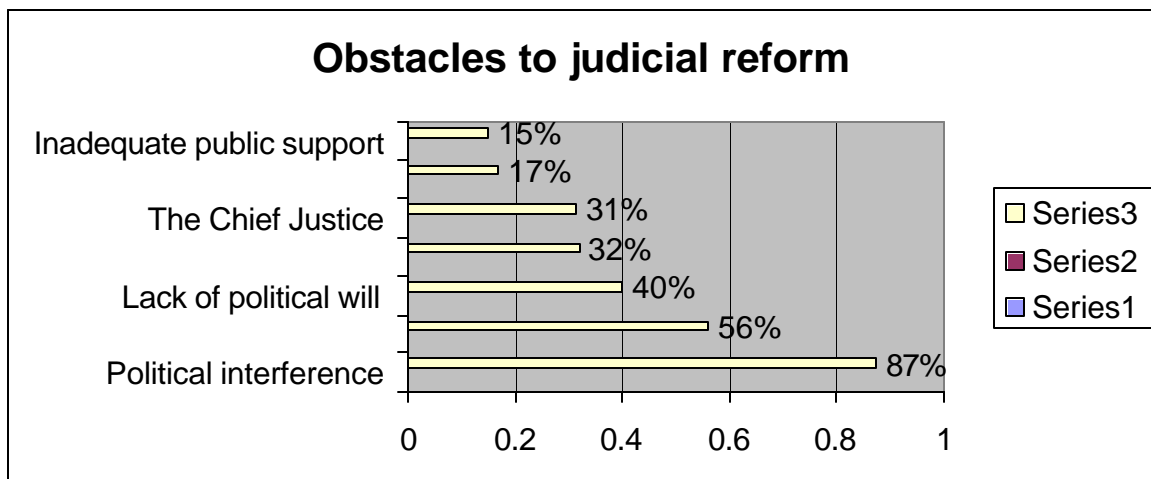
This section highlights the survey findings carried out by the Kenyan Section of the International Section of Jurists targeting various stakeholders including practising advocates, members of the civil society, professional from other sectors and the public at large.

JUDICIAL REFORM

i. Obstacles to judicial reform

From the survey, political interference in the Judiciary was seen as the main obstacle to judicial reform in Kenya today. Other chief obstacles include,

- Conservative judges
- Lack of political will on the part of the government
- Inadequate funding
- The Chief Justice
- Inadequate public support
- Unwillingness on the part of the Judiciary itself to initiate and embrace judicial reform
- Corruption

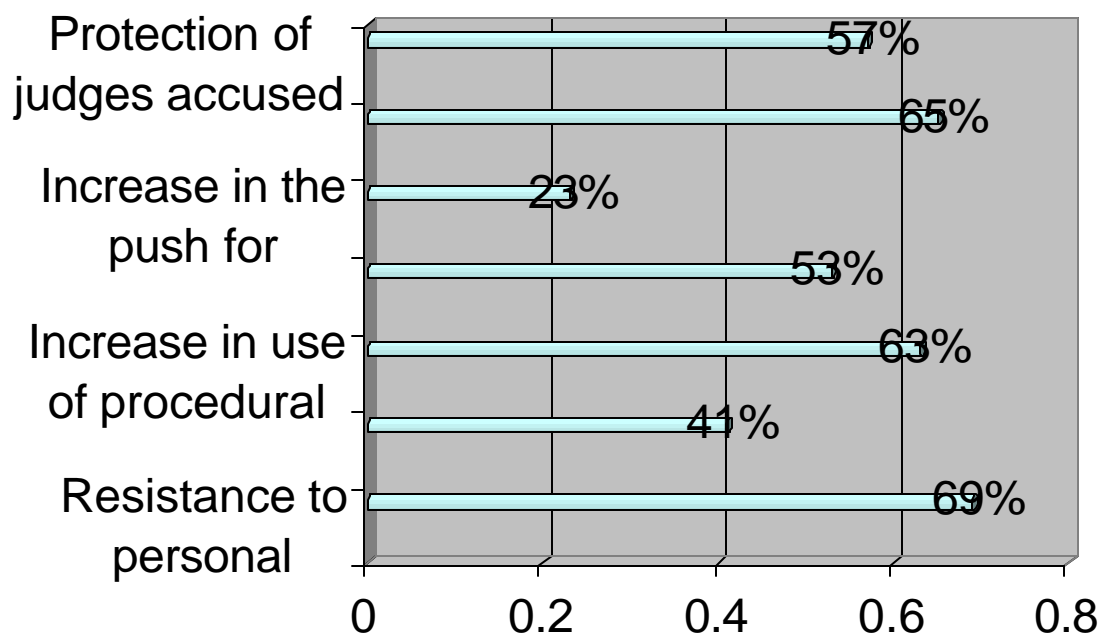


Political interference	87%
Conservative judges	56%
Lack of political will	40%
Inadequate funding	32%
The Chief Justice	31%
Lack of commitment by the Judiciary itself	17%
Inadequate public support	15%

ii. Indicators of resistance to judicial reform by the Judiciary

Resistance to personal criticism by judges	69%
Use of contempt of court laws	41%
Increase in use of procedural rules/technicality	63%
Increase in judicial corruption	53%
Increase in the push for administrative reforms only	23%
Collective defence by the Judiciary against corruption charges	65%
Protection of judges accused of corrupt practices	57%

Indicators of resistance to judicial reform



The spirited opposition to the panellist's recommendations on the Judiciary by the judges led by the Chief Justice is also a strong indicator that the Judiciary is not willing to undertake meaningful judicial reform.

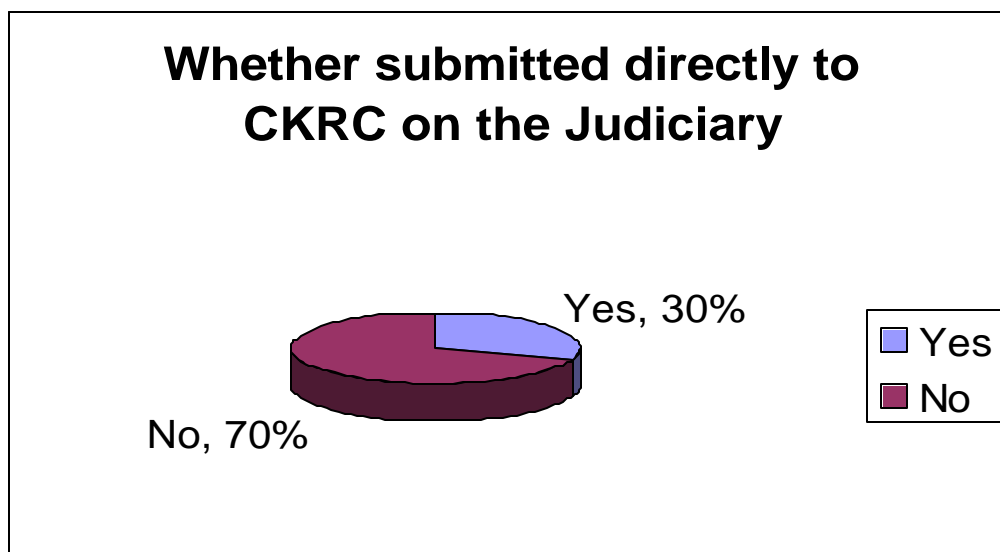
As if that was not enough, the Judiciary through two judges¹ have instituted a suit in court praying for the proposals in the draft constitution touching on the Judiciary to be removed. Such resistance to all proposals made on the Judiciary indicates without a doubt Judiciary's lack of commitment judicial reform.

It is natural to expect a dean and reform-minded Judiciary to investigate allegations of corruption against it to establish the truth, before dismissing them. This Judiciary has been fond of dismissing all allegations in a casual manner raising suspicion among Kenyans that such allegations are true. The judges resist personal criticism, use contempt laws and procedural rules and technicalities to compromise reform. It is common for judges to use the law of contempt of court to victimise critics of the Judiciary as opposed to using it for the promotion of the rule of law.

Slow and inconsistent development of precedents in Kenya is another pointer to the resistance of judicial reform by the Judiciary. This inconsistency is perceived as deliberate and systematic.

iii. Public's role in judicial reform

Among the chief obstacles to judicial reform in this country as was observed earlier in this report, is lack of public support. Our survey indicated that most Kenyans had not submitted to the Constitution of Kenya Review Commission what they wanted as far as the Judiciary is concerned. Though majority of the interviewees had not submitted directly, most of them belonged to organizations that had made their submissions to CKRC.



¹ Justices Mojjo Ole Keiwua, J.A and J.V.O Juma, J.

**Whether belongs to an organisation
that submitted to CKRC on the
Judiciary**



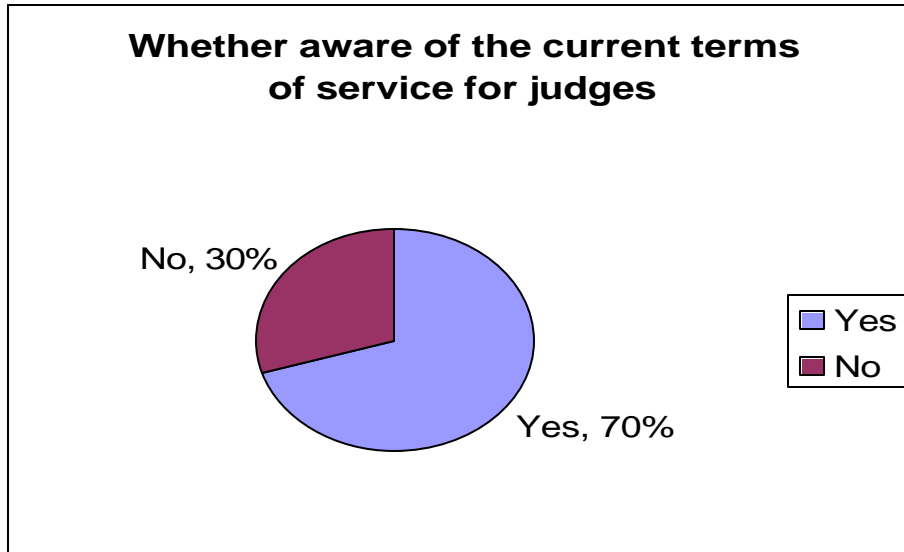
The respondents submitted that other than the adopted recommendations in the draft constitution as well as the Advisory Panel's report, other issues that should be considered in the new constitution on the Judiciary are;-

- Increase the number of judges both at the High Court and Court of appeal levels
- Transfer of judges and magistrates should be handled by a special committee and not the Chief Justice, who has been accused of abusing the power to victimise judges who are critical of the system.
- Formation of mediation courts.
- Replacing all police prosecutors with qualified lawyers.

JUDICIAL INDEPENDENCE

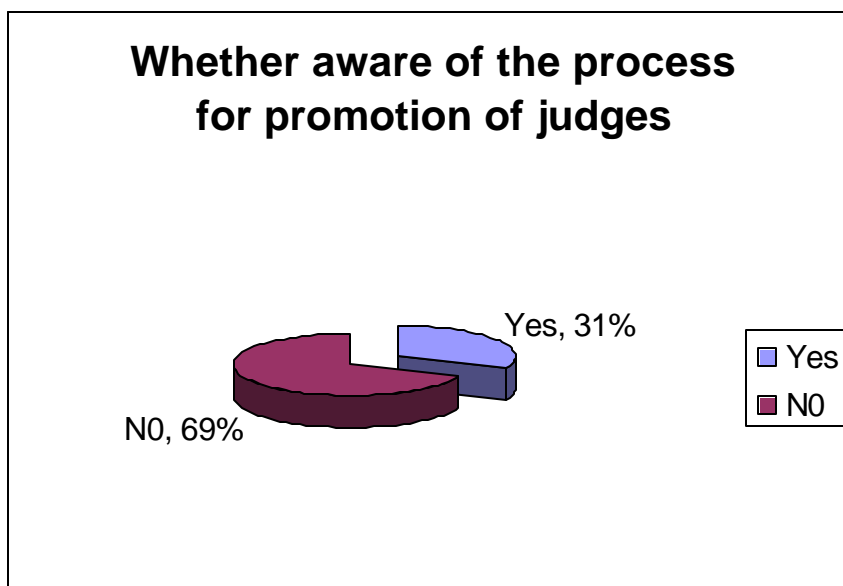
i. Fiscal autonomy and Terms of service for judges

- a) Majority of the respondents were aware that the Judiciary lacks fiscal autonomy which to some extent hampers its performance. They also stated that they were aware of the current terms of service for judges.

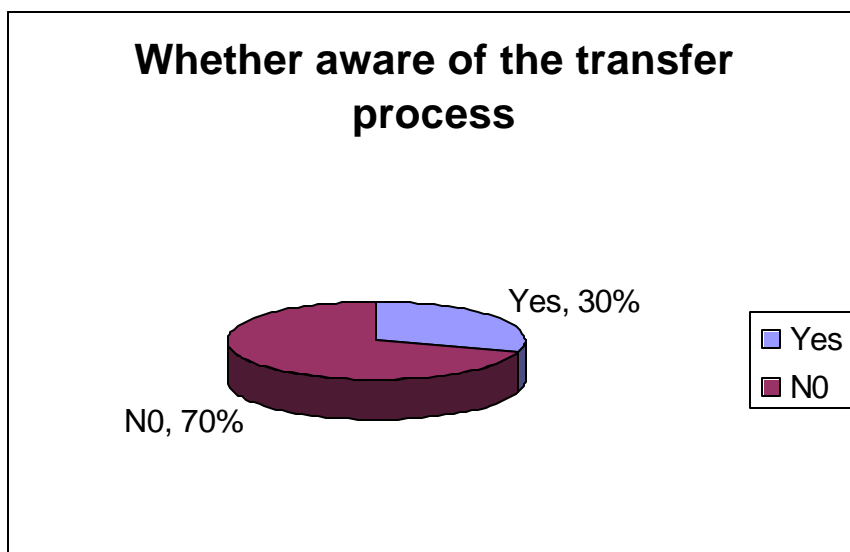


b) *Appointment and promotion of Judges*

Majority of the respondents were not aware of the criteria used in the promotion of judges.

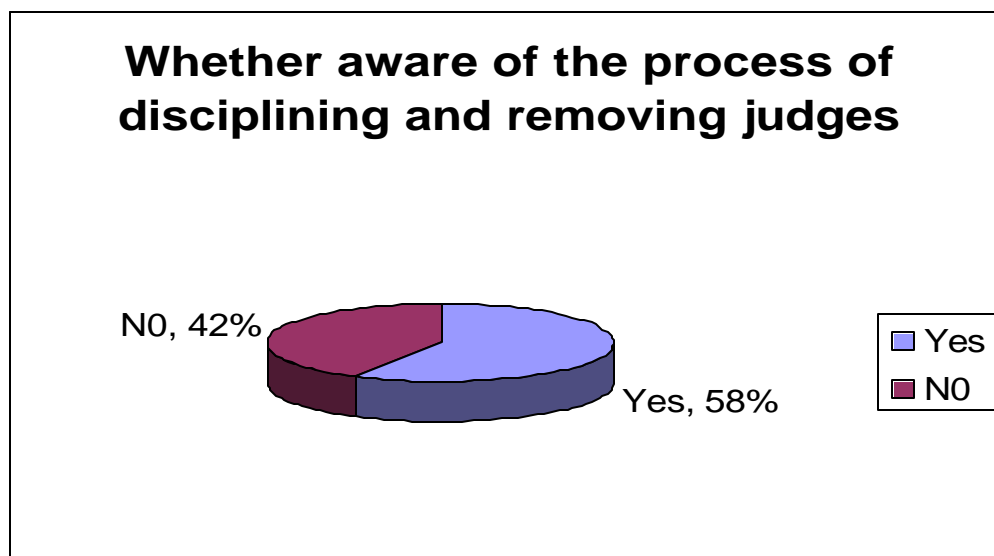


Majority of the respondents were also not aware of the transfer process in the Judiciary.



c) ***Discipline and removal of judges***

Majority of the respondents were aware of the disciplinary and removal process of judges in Kenya as prescribed by the law. However, they were not convinced that the process was being used since there were many complaints against judges that have never be addressed.



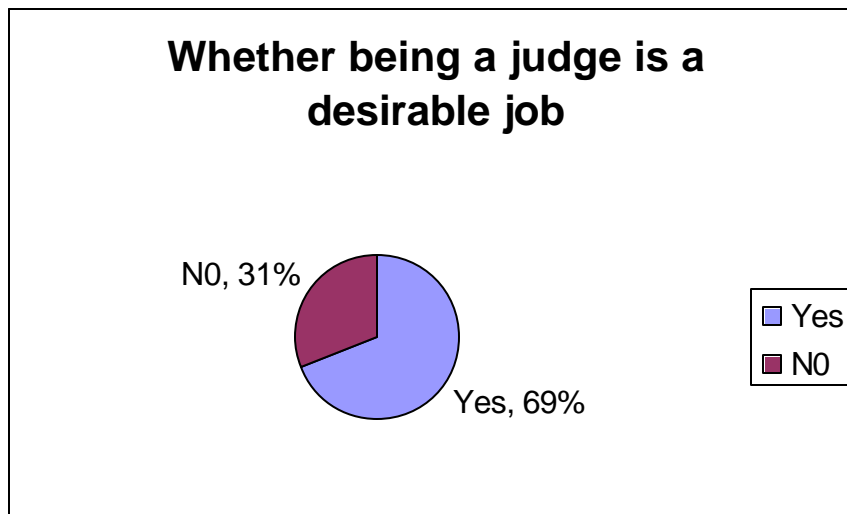
ii. Office of a judge

Majority of the respondents stated that being a judge in Kenya today was a desirable job. Reasons for this are;-

- The remuneration is good compared to other officers
- The job is noble and prestigious
- It accords an individual with an opportunity to protect and promote the rule of law and values for a just society.

However, thirty one percent felt that being a judge was not a desirable job because,

- The independence of the Judiciary and judicial officers has been compromised hence hampering delivery of justice. There is a lot of interference from both external² and internal forces³.
- The judicial processes are not transparent.
- Rampant corruption
- Too much work compared to the remuneration.
- Bad public image.
- Frustrating job due to incompetent and inefficient team and system – judges, magistrates, registries, the police and the prisons are all inefficient.

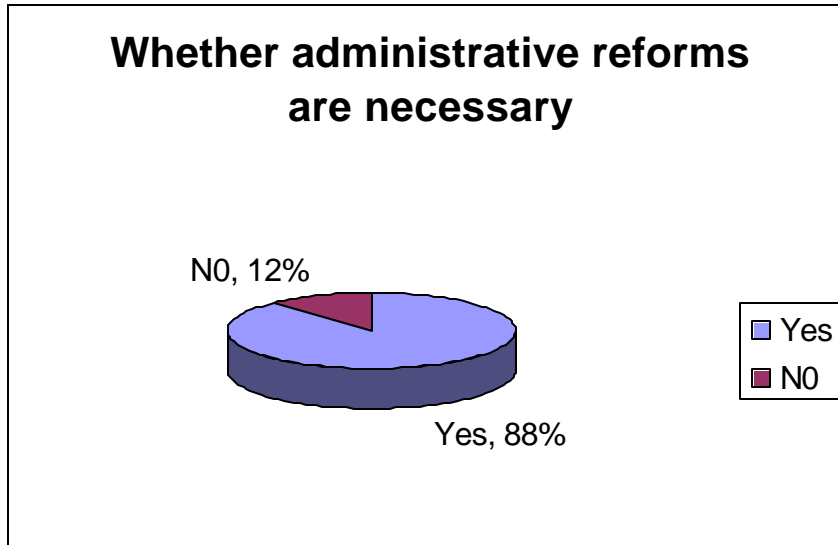


² Especially the Executive arm of Government.

³ The office of the Chief Justice.

COURT ADMINISTRATION

Majority of the respondents stated that there was need to implement administrative reforms in order to strengthen the independence of the Judiciary.



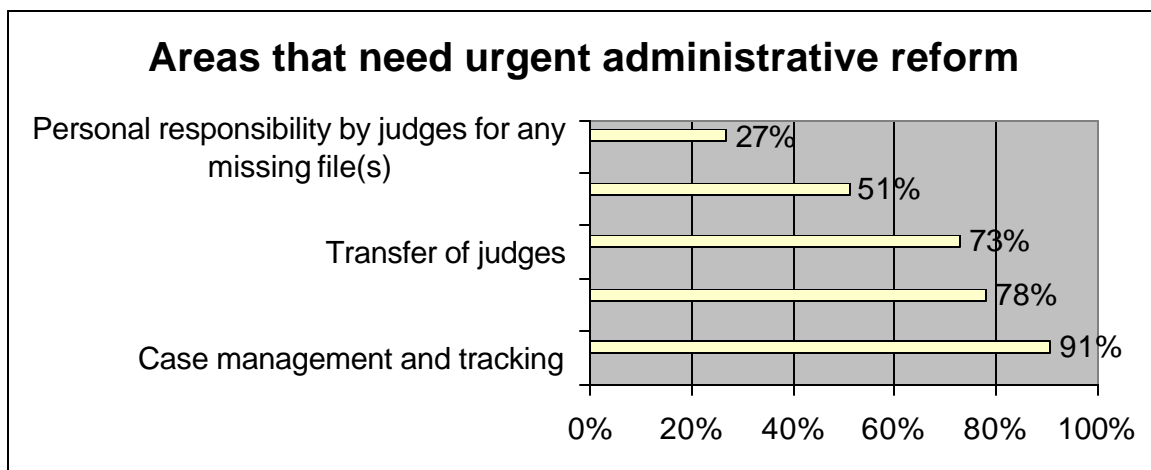
Among the key reforms that the respondents recommended include:-

- Curtailing the immense powers vested in the office of the Chief Justice as far as transfer of judges and allocation of cases to judges are concerned.
- Review of the appointment and promotion of judicial officers including judges and magistrates.
- Update and computerise all registries.
- Appoint one judge and one magistrate to be in charge of administration matters. Such an officer should handle limited number of cases so as to enable him/her to attend to administrative issues.
- All Executive officers be qualified lawyers.
- The Chief Justice should be in charge of legal affairs while the Registrar or a Deputy Chief Justice (if established) should be the overall head of all administrative issues including managing of the judicial revenue.
- Adopt a code of conduct for all judicial officers.
- Personnel section should be handled by qualified lawyers.
- Encourage use of stenographers in the court of law.
- Allocation of cases should be automated and randomly allocated to judges.
- Hire qualified personnel to transcript court proceedings so as to save the presiding officer(s) from too much writing.
- Enforce Continuous Learning Program for all judicial officers.
- Improve and add physical facilities in all courts.
- De-link the police from prosecuting role and have them deal with investigations alone.
- Have clear rules and regulations both procedural and substantial.

- Establish a special office to address complaints against judicial officers and respond to issues raised by the public on the functioning of the Judiciary.
- All judicial officers should declare their wealth annually.

Majority of the respondents recommended that reforms should be undertaken in case management and tracking mechanisms. Other areas where administrative reforms must be undertaken urgently include,

- Reforms to increase transparency in the way cases are allocated to judges
- Reforms to increase transparency in the way transfer of judges is carried out so as to curb discriminatory transfers.
- Reforms to ensure that judges devote most of their time to judicial functions
- Many respondents did not support the idea that individual judges be responsible for missing files. They said this is more of a clerical job better handled in the registry than in judges' chambers.



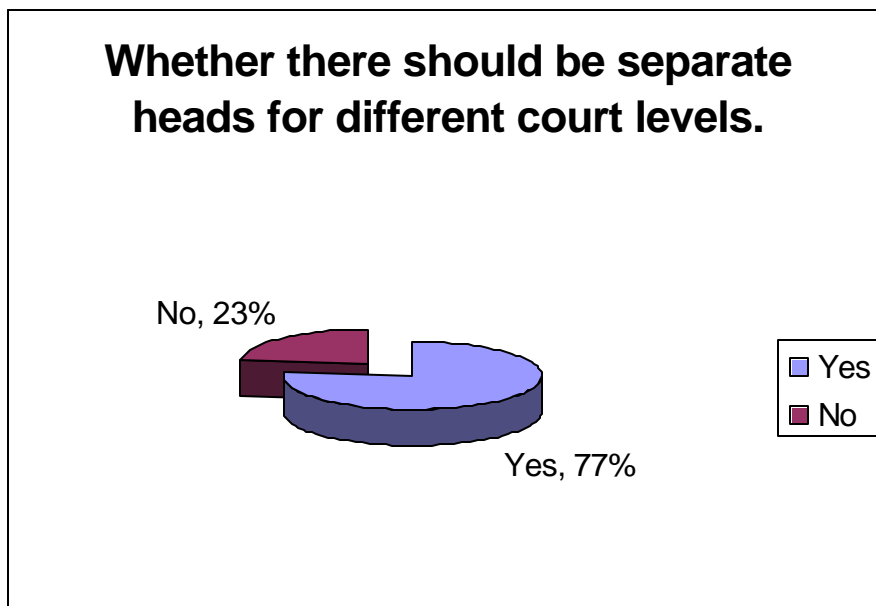
- *Case management and tracking* 91%
- *Allocation of cases to judges* 78%
- *Transfer of judges* 73%
- *Reforms to ensure that judges devote more time to judicial functions* 51%
- *Personal responsibility by judges for any missing file(s)* 27%

PANEL RECOMMENDATIONS

Having heard the views of Kenyans on the recommendations by the Advisory Panel in the validation seminar whose findings have been discussed in part one of this publication, ICJ Kenya sought more views from Kenyans who did not the seminar in the qualitative survey carried out recently. This section highlights these views.

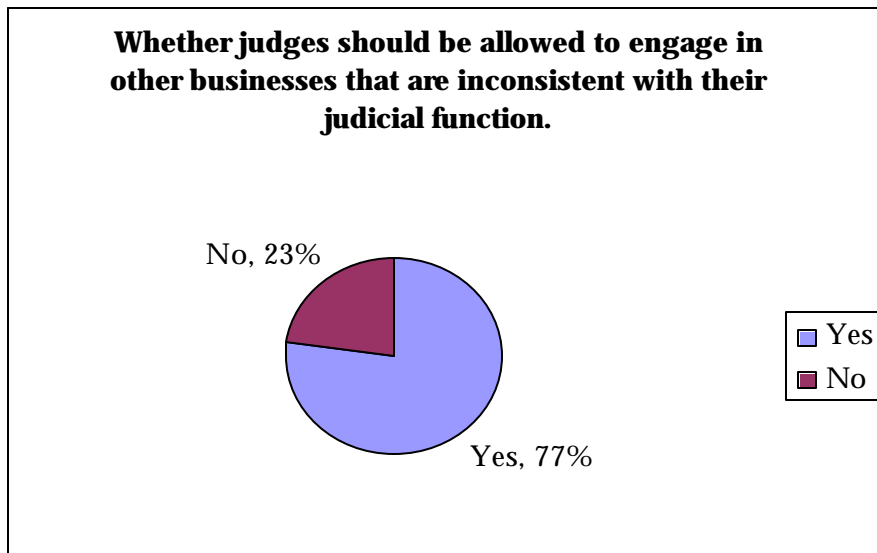
a) *The need for separate heads for all the different court levels*

Majority of the respondents supported the panellists' recommendation that there should be separate heads for all the three court tiers starting from the Magistracy to the Court of Appeal, and also the Supreme Court if ever established.



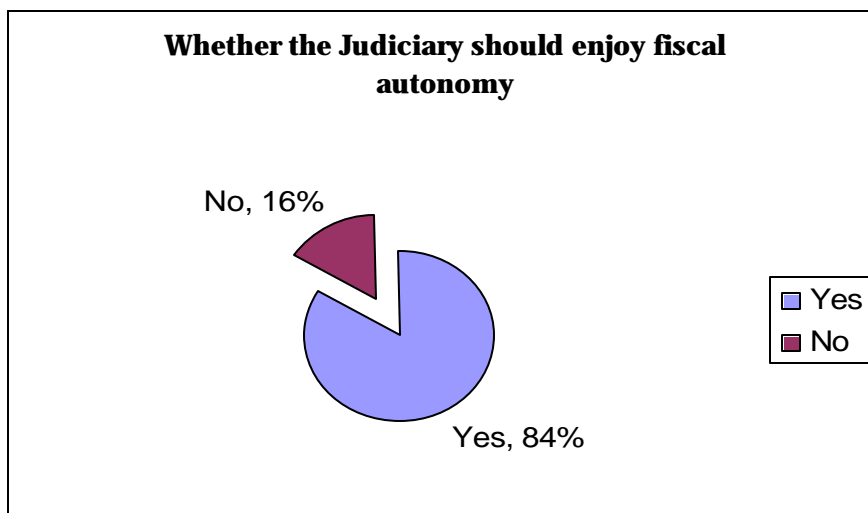
b) ***Judges' involvement in other business investments***

Majority of the respondents supported the panellists' recommendation that judges should not be allowed to engage in any other business, trade, profession or investment activity in order to preserve impartiality and accountability of the Judiciary.



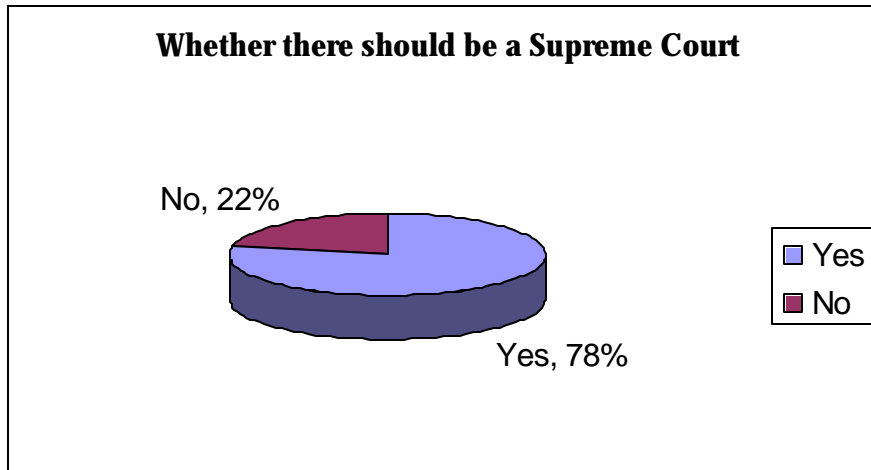
c) ***Fiscal autonomy of the Judiciary***

Majority of the respondents supported the recommendation that the Judiciary should enjoy financial independence. This will enable it to draw up its own budget and deal directly with the relevant state finance authority.



d) ***The Supreme Court***

Majority of the respondents supported recommendation that a Supreme Court be established which will exercise general appellate jurisdiction and be the final appellate court in all matters.



e) ***Minimum qualifications of Judges***

❖ **Minimum qualifications for a Chief Justice**

i. ***Service as a Judge***

Majority of the respondents recommended that he/she should have served as a,

- Supreme Court judge, or
- Judge of the Court of Appeal for a minimum of 10 years, or
- High Court judge for a minimum of 10 years.

ii. ***Practice as an advocate***

Majority of the respondents recommended that he/she should have practiced for a minimum of 10 years.

iii. ***Academic Qualifications***

Majority of the respondents recommended that he/she should be a holder of at least a Masters degree in Law.

Other qualifications include,

- Served as a magistrate for at least 10 years.
- At least 50 years old.
- Lecturer of law at a recognised University for at least 10 years.

❖ **Minimum qualifications for a Judge of the Supreme Court**

i. *Service as a Judge*

Majority of the respondents recommended that he/she should have served as a,

- Judge of the Court of Appeal for a minimum of 10 years, or
- High Court judge for a minimum of 10 years.

ii. *Practice as an advocate*

Majority of the respondents recommended that he/she should have practiced for a minimum of 10 years.

iii. *Academic Qualifications*

Majority of the respondents recommended that he/she should be a holder of at least a Masters degree in Law.

Other qualifications include,

- Served as a magistrate for at least 10 years.
- At least 50 years old.
- Lecturer of law at a recognised University for at least 10 years

❖ **Minimum qualifications for a Judge of the Court of Appeal**

i. *Service as a Judge*

Majority of the respondents recommended that he/she should have served as a,

- High Court judge for a minimum of 5 years.

ii. *Practice as an advocate*

Majority of the respondents recommended that he/she should have practiced for a minimum of 10 years.

iii. *Academic Qualifications*

Majority of the respondents recommended that he/she should be a holder of at least a Bachelors degree in Law (LLB).

Other qualifications include,

- Served as a magistrate for at least 10 years.
- At least 45 but not more than 70 years old.
- Lecturer of law at a recognised University for at least 10 years

❖ **Minimum qualifications for a Judge of the High Court of Kenya**

i. ***Service on the Bench***

Majority of the respondents recommended that he/she should have served as a,

- Senior Magistrate⁴ for not less than 5 years.

ii. ***Practice as an advocate***

Majority of the respondents recommended that he/she should have practiced for a minimum of 10 years.

iii. ***Academic Qualifications***

Majority of the respondents recommended that he/she should be a holder of at least a Bachelors degree in Law (LLB).

Other qualifications include,

- At least 35 but not more than 70 years old.
- Lecturer of law at a recognised University for at least 10 years

❖ **Minimum qualifications for a Magistrate**

ii. ***Practice as an advocate***

Majority of the respondents recommended that he/she should have practiced for a minimum of 3 years.

iii. ***Academic Qualifications***

Majority of the respondents recommended that he/she should be a holder of at least a Bachelors degree in Law (LLB).

Other qualifications include,

- Lecturer of law at a recognised University for at least 3 years

f) ***Gross Misconduct and other reasons for the removal of judges***

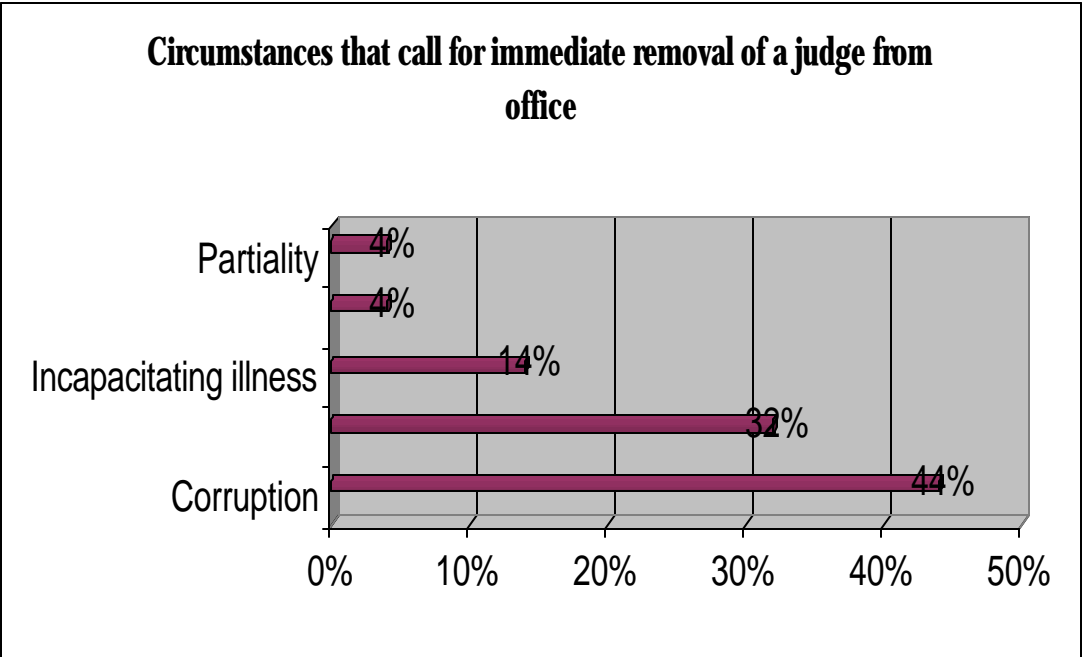
Majority of the respondents listed corruption as the worst form of misconduct that calls for immediate removal of a judge.

Others reasons were;-

- Incompetence
- Incapacitating illness
- Bankruptcy
- Lack of impartiality due to political affiliation or business engagement that are inconsistent with judicial functions
- Breach of the Constitution

⁴ Chief Magistrate or Senior Principal Magistrate.

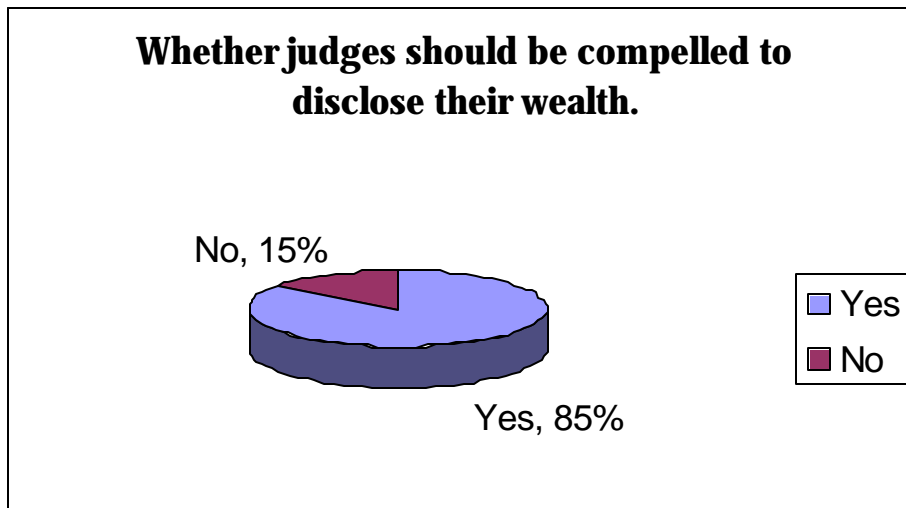
- Abuse of the office of a judge
- Abuse of human rights using the office of a judge.



<i>Corruption</i>	<i>44%</i>
<i>Incompetence</i>	<i>32%</i>
<i>Incapacitating illness</i>	<i>14%</i>
<i>Bankruptcy</i>	<i>5%</i>
<i>Partiality</i>	<i>5%</i>

g) ***Disclosure of wealth***

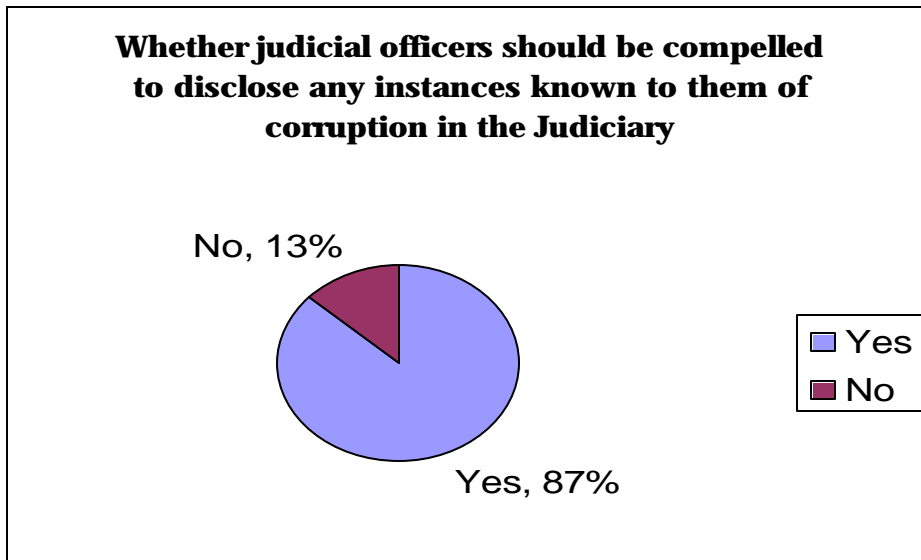
Majority of the respondents supported the recommendation that judges should be compelled to disclose their wealth⁵ annually failure of which would constitute judicial misconduct.



h) ***Reporting Judicial Corruption***

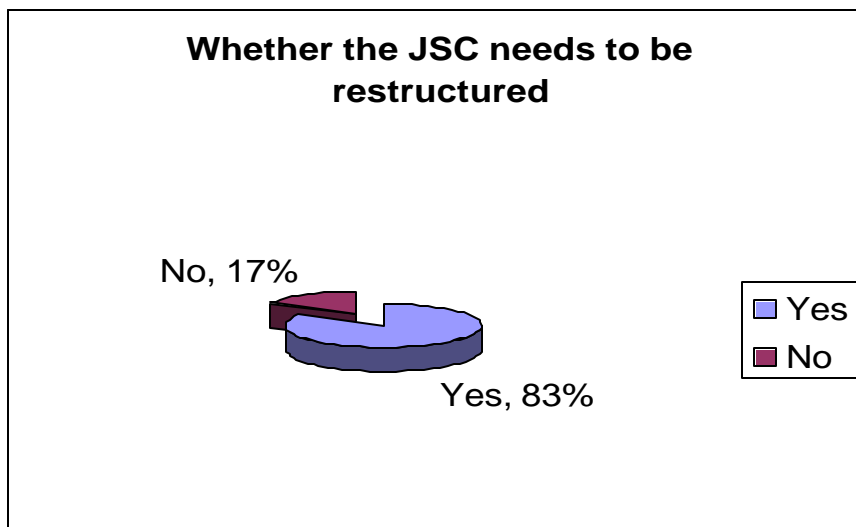
Majority of the respondents supported the recommendation that all judicial officers, judges and magistrates should be under legal obligation to disclose to the Judicial Service Commission any instances known to them of bribery and corruption in the administration of justice, failure of which would constitute judicial misconduct.

⁵ All assets, property and investments they own as well as disclosure of all sources of such wealth.

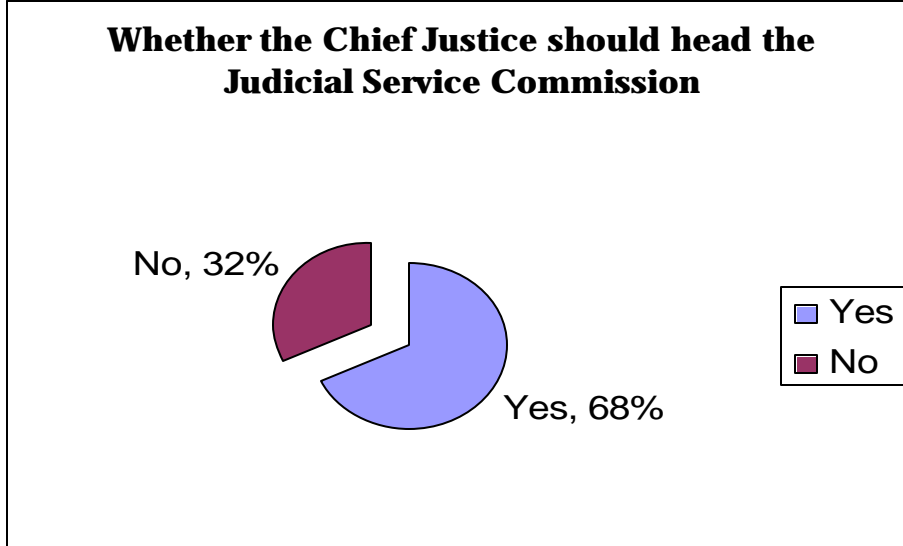


i) **Judicial Service Commission**

1. Majority of the respondents supported the panellist's recommendation that the Judicial Service Commission should be restructured so as to make it more efficient and effective. To most of the respondents, this institution is 'non-existent'.



2. Further, majority of the respondents supported the recommendation that the Chief Justice should not be the head of the Judicial Service Commission. They cited patronage as the main problem associated with the Chief Justice heading this commission.



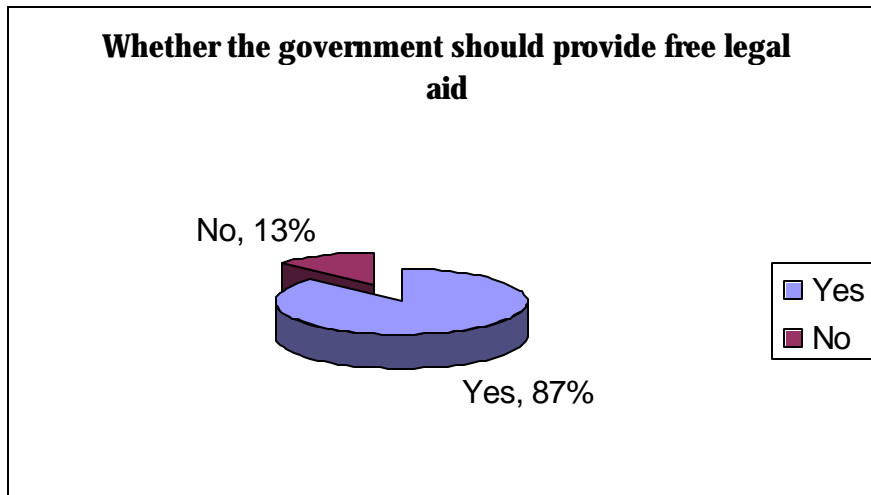
3. Members of the Judicial Service Commission

Majority of the respondents suggested that the Judicial Service Commission should comprise of persons from the following:

- The Chief Justice as an ordinary member
- The Attorney General
- Representative(s) from the Court of Appeal
- Representative(s) from the High Court
- Representative(s) from the Magistracy
- Representative(s) from the Law Society of Kenya
- Representative(s) from the Civil Society (NGO)
- Representative(s) from the Kadhi's Court
- Representative(s) from the Religious Sector
- Representative(s) from the Public Service Commission
- Representative(s) from the Faculties of Law
- Representative(s) from the Parliamentary Committee on Legal and Constitutional Affairs
- Lay persons

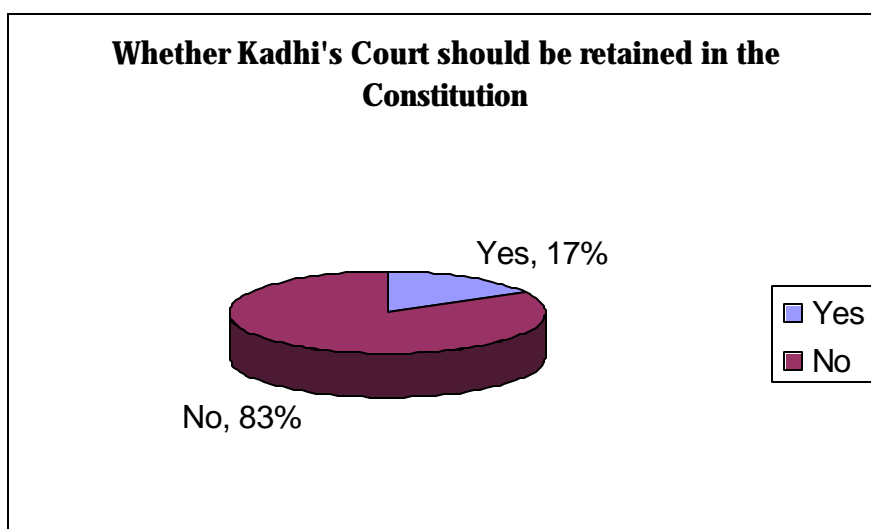
j) **Legal Aid**

Majority of the respondents supported the recommendation that the government should be compelled to provide free legal aid particularly in criminal cases.



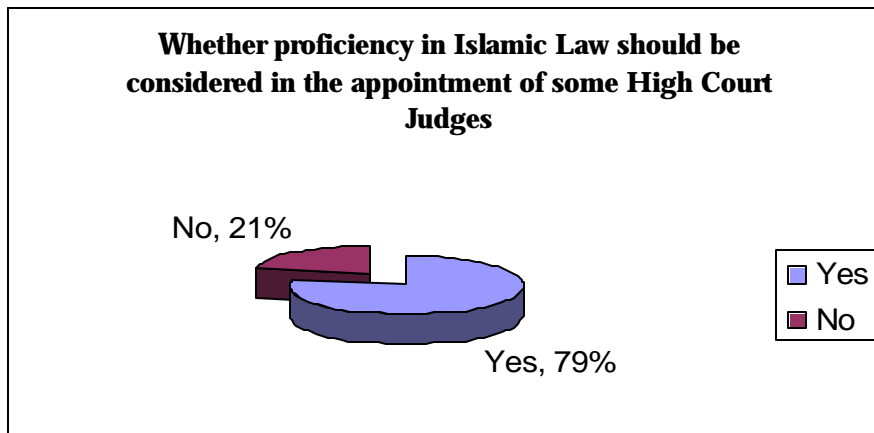
k) ***Kadhi's Court***

Majority of the respondents called for the removal of the Kadhi's Court from the Constitution. They further stated that Kenya is a secular state and therefore all religions should stay in the private domain. Islamic law, just like the customary laws and all other personal laws should be systems that facilitate alternative dispute resolution hence should not be a source of or part of the public law.



Majority of the respondents who commented on the Court suggested that the Kadhi's Court should have a larger female presence and should be friendly to gender issues. However, majority of the respondents knew very little on the Kadhi's Court hence did not know what should or should not be changed in this court.

In order to harmonise the two judicial systems, most of the respondents suggested that consideration should be given to the appointment of judges to the High Court who are proficient in Islamic law.



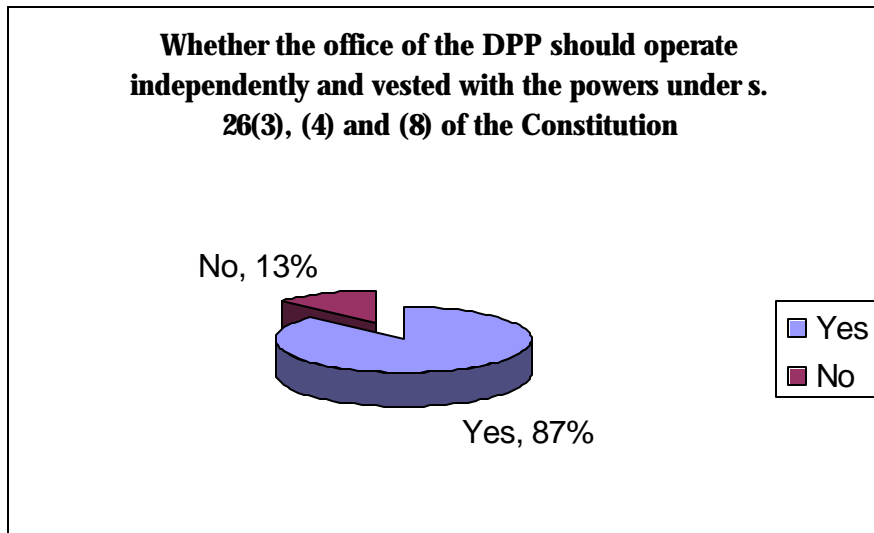
l) *Office of the Director of Public Prosecutions*

Majority of the respondents supported the panellist's recommendation that the office of the Director of Public Prosecutions should function independently and be vested with the powers under section 26(3)⁶, (4)⁷ and (8)⁸ of the Constitution of Kenya, currently vested in the Attorney General.

⁶ The power to institute and undertake criminal proceedings against any person before any court; the power to take over and continue any such criminal proceedings that have been instituted or undertaken by another person or authority; and the power to terminate any such criminal proceedings instituted or undertaken by himself or any other person or authority at any stage before judgment is delivered.

⁷ The power to require the Commissioner of Police to investigate any matter so directed.

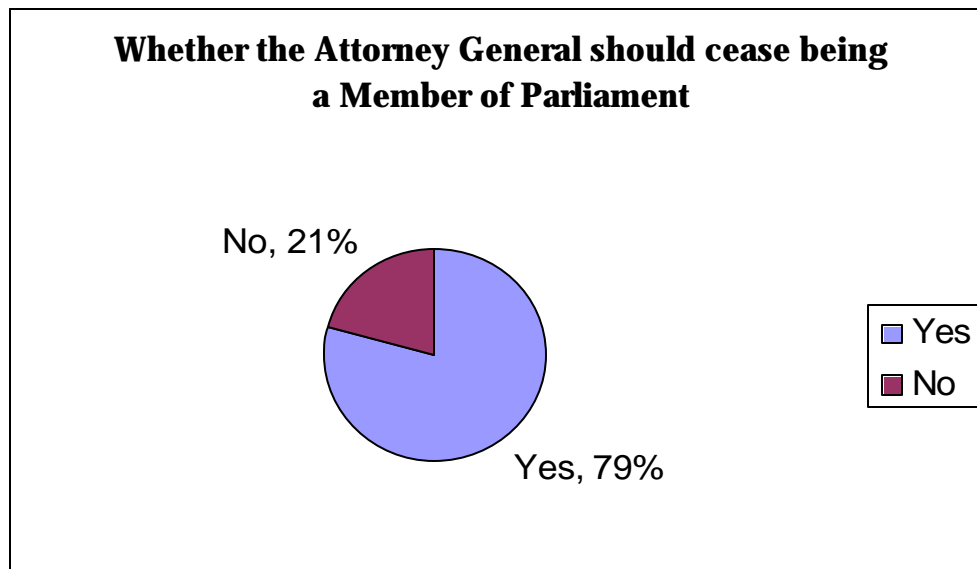
⁸ Shall exercise functions under s. 26(3) and (4) independently.



Majority of the respondents called for the strengthening of the Parliamentary Committee on Legal and Constitutional Affairs to make it more effective.

m) ***Attorney-General***

Majority of the respondents supported the recommendation that the Attorney General should not be a Member of Parliament, but instead there be a Minister of Justice to attend to all political issues including responsibility for legal, judicial and constitutional issues in parliament.



n) ***Interim Measures***

With regard to transitional issues, the following were some of the respondents' recommendations as conveyed by the majority;-

- The current Bench should re-apply for their positions and those found guilty of corrupt practices be dismissed with immediate effect.
- Establish an independent and open complaint committee to hear complaints against judges. This committee should be appointed by the President upon the request of the Chief Justice and should include persons agreed upon by key stakeholders, including the Judiciary, Attorney General's office, the Law Society of Kenya, Civil Society, Private Sector, among others.
- Judges be given minimum required performance standards and have all judicial officers declare their wealth.
- Develop a monitoring mechanism on the handling of cases.
- Revise an appraisal system that reveals performance of the Chief Justice, Judges, and Magistrates and get rid of non performers.
- Establish an election court with powers to deal with pre-election disputes.
- Compile a register of public complaints against the judiciary and against specific judicial officers and commence investigations into the same.

Appendix I

SUMMARY OF RECOMMENDATIONS BY THE ADVISORY PANEL

I. Vesting Judicial Power and the Principles of Judicial Independence in the Constitution

1. We recommend the entrenchment of the terms of office for judges to ensure that as individuals, they enjoy the necessary protections to allow them to decide cases without fear or favour, affection or ill-will, in an open and public manner and in accordance with the law.
2. We recommend vesting judicial authority in the Judiciary along side the Executive and Parliament to ensure recognition of and respect for the distinctive role of the courts in the governance of the Republic of Kenya.
3. We recommend that the Chief Justice shall be head of the Judiciary and shall provide judicial leadership at all times. The Chief Justice shall preside over and have direct administrative responsibility for the Supreme Court. There shall be a President of the Court of Appeal and President of the High Court to preside over and have direct responsibility for the administration of those courts.
4. We recommend that the following principles be enshrined in the Constitution in relation to the terms and conditions of judicial office:
 - a) Judges shall be persons of integrity and ability with appropriate training and qualifications in law.
 - b) Judges shall exercise judicial power impartially and in accordance with the law and authority without fear, favour or ill-will.
 - c) The tenure of Judges shall be guaranteed and adequately secured by the Constitution.
 - d) The Constitution shall provide that the remuneration and other terms and conditions of service of Judges shall be adequately secured by law and shall not be reduced or altered to their disadvantage.
 - e) Judges shall not be liable to any action or suit for any act or omission in the exercise of their judicial powers or functions.
 - f) Judges shall be free to form associations that represent their interests, to promote their professional training and to protect their judicial independence.
 - g) Judges are entitled to freedom of expression, belief, association and assembly on condition that they shall always conduct themselves in a manner that preserves the dignity of their office, their impartiality and the independence of the Judiciary.
 - h) Judges must always strive to uphold their integrity and independence by refraining from impropriety or any appearance of impropriety.
 - i) Judges shall devote their full time and attention to their judicial duties and shall not engage in any business, trade, profession or other activity inconsistent with the judicial function.
5. We recommend that the financial independence of the Judiciary be entrenched in the Constitution. The Judiciary should enjoy financial budgetary autonomy, draw up its own budget and deal directly with the relevant state finance authority. The state shall be obliged to provide adequate financial resources to enable the Judiciary to perform its functions effectively.

II. A Supreme Court

6. We recommend the establishment of a Supreme Court comprised of a small number of select jurists of unquestionable skill, judgment and integrity.
7. We recommend that in addition to the existing courts of judicature of Kenya, namely the High Court and the Court of Appeal, there be established the Supreme Court of Kenya to consist of:
 - a) The Chief Justice and
 - b) Such number of justices of the Supreme Court not being less than six, as Parliament may by law establish.

The Supreme Court shall exercise general appellate jurisdiction. It shall be the final court of appeal in all matters.

III. Appointment of Judges

8. We recommend the adoption of a clearly established transparent appointment process with clearly stated criteria under the authority of a restructured Judicial Service Commission.
9. We recommend that the appointment of all judges, including the Chief Justice, be made by the President in accordance with the written recommendation of the Judicial Service Commission and after the President has duly and formally consulted the Parliamentary Committee responsible for judicial affairs, which we propose be established.
10. We recommend that only distinguished judges and jurists of proven integrity and impeccable character as determined by the Judicial Service Commission be appointed as Chief Justice and as judges of the High Court, Court of Appeal and Supreme Court.
 - a) The minimum constitutional qualification for appointment as Chief Justice or as a judge of the Supreme Court shall be a total of fifteen years experience:
 - i) as a judge of the High Court or Court of Appeal,
 - ii) practising as an advocate, or
 - iii) full-time law teaching in a recognized University.
 - b) The minimum constitutional qualification for appointment as a judge of the Court of Appeal shall be a total of ten years experience:
 - i) as a judge of the High Court,
 - ii) practicing as an advocate, or
 - iii) full-time law teaching in a recognized University.
 - c) The minimum constitutional qualification for appointment as a judge of the High Court shall be a total of ten years experience:
 - i) as a magistrate, or
 - ii) practicing as an advocate.

IV. Terms of Office, Conduct and Removal

- 12 We recommend a transparent complaint and removal process, to be established through a restructured Judicial Service Commission in the following terms.

- a) A judge may be removed from office only for
 - i) inability to perform the functions of his or her office arising from infirmity of body or mind, or
 - ii) misbehaviour, misconduct or incompetence of such a nature as to make the judge unfit for judicial office.
- b) A judge may only be removed from office in accordance with the procedure prescribed by the Constitution.
 - i) The Constitution shall provide that any individual or institution, society or group of individuals may lodge a complaint against any judge to the Judicial Service Commission.
 - ii) The Judicial Services Commission shall investigate and if it is satisfied that consideration should be given to the removal of the judge from office, it shall request the President to appoint a Judicial Tribunal of eminent judges to conduct a hearing into the allegation.
 - iii) If the Judicial Service Commission finds the judge's behaviour to be inappropriate but is not satisfied that consideration should be given to the removal of the judge from office, it may inform the judge of its assessment of the judge's conduct.
 - iv) The Judicial Tribunal shall report its findings and recommendation to the President who shall act in accordance with that recommendation.
 - v) Where a judge is under investigation by a Judicial Tribunal, the Judicial Service Commission may recommend to the President that the judge be suspended without loss of remuneration or benefits pending the Judicial Tribunal's hearing of the complaint and the President shall act in accordance with the recommendation of the Judicial Service Commission.

11. We also recommend that a comprehensive Code of Conduct for judges, magistrates and judicial officers be formally adopted and that it should impose two important obligations. First, all judges, magistrates and judicial officers should be required to file with the Judicial Service Commission upon appointment and annually thereafter a financial disclosure statement clearly disclosing all assets, property or investments owned and all sources of income. Failure to make full and accurate financial disclosure may constitute judicial misconduct. Second, all judges, magistrates and judicial officers should be under a legal obligation to disclose to the Judicial Service Commission any instance known to them of bribery or corruption in the administration of justice. Failure to report may constitute judicial misconduct.

V. Judicial Service Commission

12. The Advisory Panel recommends that a restructured Judicial Service Commission be entrenched in the Constitution.
13. We recommend that in its restructured form, the Judicial Service Commission shall comprise the following members who shall be persons of high moral character and proven integrity:
 - a) full-time chairperson whose qualifications shall be comparable to those of a Supreme Court Judge.
 - b) One member appointed by the Chief Justice.
 - c) Two lay members of the public appointed by the President in consultation with the proposed Parliamentary judicial affairs committee.

- d) Two members nominated by the Law Society of Kenya.
 - e) Two members elected by the faculties or schools of law of the universities Kenya.
 - f) Three judges elected by the Supreme Court, Court of Appeal and the High Court respectively.
 - g) Two members elected from the subordinate courts.
 - h) One member representing the Public Service Commission nominated by the Public Service Commission.
 - i) The Attorney General as an ex-officio member.
14. We recommend that the Judicial Service Commission shall have the following functions:
- a) To recommend to the President persons for appointment as judges, including the Chief Justice.
 - b) To review and make recommendations on terms and conditions of service of judges, magistrates and other judicial officers.
 - c) To appoint, discipline and remove registrars, magistrates and other judicial officers including paralegal staff in accordance with the law as prescribed by Parliament.
 - d) To receive and investigate complaints against judges in accordance with the Constitution.
 - e) To prepare and implement programmes for the education and training of judges, magistrates and paralegal staff.
 - f) To advise the government on improving the efficiency in the administration of justice and access to justice including legal aid.
 - g) To encourage gender equity in the administration of justice in Kenya.
 - h) Any other function as may be prescribed by the Constitution or any other legislation enacted by Parliament.

VI. Access to Justice and Efficiency

- 15. We recommend that the restructured Judicial Service Commission be specifically mandated by the terms of the Constitution to advise the government on improving access to justice. It is our hope that this would focus attention on this vital issue and achieve the necessary reforms.
- 16. We recommend that serious consideration be given to enhancing the availability of legal aid. We find particularly disturbing the present failure to ensure full legal representation for all proceedings involving persons accused of capital offences.
- 17. We recommend that the restructured Judicial Service Commission be specifically mandated to advise the government on improving efficiency in the administration of justice.

VIII. Kadhis' Courts

- 18. We recommend no change to the current constitutional provisions regarding the Kadhi's' Courts. We recommend, however, that consideration be given to the appointment of judges to the High Court who are proficient in Muslim Law.

VIII. Attorney General and the Director of Public Prosecutions

19. The Panel recommends the establishment of an office of the Director of Public Prosecutions, vested with the powers that are now vested in the Attorney General under section 26(3), (4) and (8) of the Constitution together with any other appropriate powers for this office and these should be clearly set out in legislation. The Director of Public Prosecutions shall exercise these functions independently without interference, control or direction of any other person or authority.
20. We further recommend that the Director of Public Prosecutions should be appointed by the President in accordance with the recommendation of the Public Service Commission after consultation with the Parliamentary committee responsible for legal and Constitutional affairs. The Director of Public Prosecutions should be appointed from among persons of proven integrity and moral character qualified to be appointed a Judge of the High Court. The Public Service Commission shall consult with the Judicial Service Commission prior to making its recommendation.
21. We recommend that the Attorney General no longer be a member of the National Assembly and that there be a Minister of Justice to attend to all political issues, including responsibility for legal, judicial and constitutional issues in Parliament.
22. We recommend that the Attorney General be appointed by the President with the approval of the Parliamentary committee responsible for legal and Constitutional affairs from among persons of proven integrity, moral character who are qualified to practise as advocates and who have not less than 10 years experience.

IX. Magistracy

23. We recommend:
 - a) That the *Magistrates' Courts Act* be reviewed in order to realign the Courts established under section 7 (1) with their respective grades in every District throughout Kenya.
 - b) Each Magisterial area should be designated to its grade and jurisdiction to which a magistrate of a specified grade would be posted. Magistrates of lower grades posted to the courts of higher grades or designation may only do so in an acting capacity.
 - c) Magistrates assigned to the courts of specified grade shall exercise such jurisdiction as may be determined by Parliament from time to time.
 - d) A hierarchical system of appeal in all matters from the lowest to the highest Magistrates' court and thereafter to the High Court, Court of Appeal and the Supreme Court should be established by Parliament.
 - e) The Judicial Service Commission shall be responsible for making recommendations on the remuneration, terms and conditions of service for Magistrates' and other subordinate courts.
24. We recommend that there should be a judicial officer designated to have primary responsibility for the administration of all Magistrates' Courts throughout Kenya.

X. Election Petition Appeals

25. We recommend that appeals in election petitions should lie from the Court of Appeal to the Supreme Court on a point of law only.

XI. Interim Measures

26. The Panel recommends that as an interim measure there be a Committee to receive complaints about the conduct of any judge in Kenya in order to assist the Chief Justice in the discharge of his constitutional obligation to decide whether a complaint ought to be investigated by a tribunal appointed by the President under s. 62(5).
27. We recommend that the Committee be set up by the Attorney General and include the following
 - a) A member appointed by the Attorney General to represent the public of Kenya.
 - b) A member nominated by the Law Society of Kenya.
 - c) A member nominated by the International Commission of Jurists (Kenya Section).
 - d) A member nominated by the Federation of Women Lawyers of Kenya.
 - e) A member nominated by the Faculties of Law of Kenyan Universities.

The Committee shall be responsible for selecting a Chairperson from among its members. It is crucial that the members of this Committee be persons of unquestionable integrity, competence and resolve. The Committee must be provided with adequate resources to fulfill its role, including office space, staff and equipment.

28. We recommend that the mandate for the Committee be as follows:
 - a) To receive complaints about the conduct of any judge in Kenya from any source.
 - b) To assess the merits of such complaints and to refer to the Chief Justice any complaints that he should consider for investigation by a tribunal pursuant to section 62 (5) of the Constitution of Kenya.